MOTION FILED
NOV 4 1982

No. 81-2150

IN THE

Supreme Court of the United States

October Term, 1982

JIM MCNEFF, INC.,

Petitioner,

vs.

FRANK L. TODD, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

MOTION OF THE CARPENTERS TRUST FUNDS FOR SOUTHERN CALIFORNIA, THE CONSTRUCTION LABORERS TRUST FUNDS FOR SOUTHERN CALIFORNIA AND THE CEMENT MASONS TRUST FUNDS FOR SOUTHERN CALIFORNIA FOR LEAVE TO FILE BRIEF *Amici Curiae* AND BRIEF *Amici Curiae* IN SUPPORT OF RESPONDENTS.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Supreme Court Rule 36(3), the Carpenters Trust Funds for Southern California, the Construction Laborers Trust Funds for Southern California and the Cement Masons Trust Funds for Southern California hereby respectfully move for leave to file the attached brief *amici curiae* in this case. The consent of counsel for the Petitioner and Respondents was requested and was withheld.

These amici have an interest in the outcome of this case because they are parties to more than 250 cases pending in

state and federal courts in California in which the issue of the enforceability of Section 8(f) pre-hire agreements is raised.

In the instant case, Petitioner argues in effect that the collective bargaining agreement that it signed was void *ab initio*. A ruling to that effect could be most damaging to our client trust funds.

Respectfully submitted,

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Respondents.

BRIEF *Amici Curiae* IN SUPPORT OF RESPONDENTS.

Interest of the *Amici Curiae*.

Amici curiae, Carpenters Trust Funds for Southern California, Construction Laborers Trust Funds for Southern California and the Cement Masons Trust Funds for Southern California are comprised of the following employee benefit plans:

Carpenters Pension Trust for Southern California

Carpenters Health and Welfare Trust for Southern California

Eleven County Carpenters Vacation Savings and Holiday Plan

Carpenters Joint Apprenticeship and Training Committee Fund for Southern California

Construction Laborers Pension Trust for Southern California

Laborers Health and Welfare Trust for Southern California

Construction Laborers Vacation Trust for Southern California

Laborers Training and Retraining Trust for Southern California

Cement Masons Southern California Pension Trust

Cement Masons Southern California Health and Welfare Fund

Eleven Counties Cement Masons Vacation Savings Plan

Cement Masons Joint Apprenticeship Trust

Cement Masons Southern California Individual Retirement Account Trust

Each of these trusts is a multiemployer employee benefit plan created pursuant to collective bargaining between employers and unions; each was organized and is administered pursuant to the provisions of Section 302(c) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §186(c).

Over 50,000 carpenters, laborers and cement masons are active participants in these *amici* trust funds. Approximately 21,000 retired individuals are currently receiving pension benefits from the pension trust *amici*. Payments to these retirees find their primary source in the regular contributions made by employers pursuant to their respective collective bargaining agreements.

Contributions to the Carpenters Trust Funds are made by approximately 2,500 employers. The Construction Laborers Trust Funds receive contributions from more than 3,700 employers. Over 900 employers make contributions to the Cement Masons Trust Funds. Of this group of employers, a substantial number *may* have signed Section 8(f) agreements with the unions. Thus, the Court's decision will po-

tentially affect a majority of the Trusts' contributors, which may undermine the trusts' income stream and their ability to serve their participants.

Summary of Argument.

Amici wish to present three essential points of concern:

I. The void *ab initio* approach[1] imposes such a great hardship on trust funds that it offends national labor policy. The vested rights of these intended third party beneficiaries cannot and should not be divested retrospectively.

II. The Fifth Circuit's void *ab initio* approach does not withstand critical analysis and is inconsistent with the law developed by the National Labor Relations Board and the Court.

III. Payments to an employee benefit fund do not run counter to the policies of the Act[2] as expressed in Sections 7, 8 and 9 thereof. Therefore, compelling an employer to live up to its obligations serves the policy goals of Section 301(a) in that it preserves contract rights and bargained-for consideration as well as preserving the actuarial soundness of pension and health and welfare plans.

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[1]The term void *ab initio* approach" is a shorthand expression used to refer to the holding in *Baton Rouge Building and Construction Trades Council v. E.C. Schafer Construction Co.*, 657 F.2d 806 (5th Cir. 1981), wherein the Fifth Circuit determined that Section 8(f) pre-hire agreements are void and unenforceable prior to the time that the unions signatory to the agreements represent a majority of the employers' employees.

[2]The term "Act" is used throughout to mean the National Labor Relations Act of 1935, as amended, 29 U.S.C. §151 *et seq.*

ARGUMENT.

I.

As a Matter of National Labor Policy, Pre-Hire Agreements Cannot Be Held to Be Void *Ab Initio* For to Do So Would Work a Severe Hardship on Employee Benefit Plans.

The fringe benefits provided to employees through Taft-Hartley trust funds have become an important part of our national labor policy. Congress has seen fit to regulate extensively in this area. The courts, pursuant to the mandate of Sections 301 and 302 of the Act, have developed and continue to develop a federal common law concerning the relationships between employer, employee, labor union and trustees of Taft-Hartley trust funds.[3] These *amici* speak from the latter viewpoint as neutrals in labor-management matters. Under collective bargaining agreements, of whatever stripe, the trustees have the right and duty to enforce the employer's promise to pay. As long ago stated by the Court: "The trustees stand in the shoes of the employees and are entitled to enforce their rights." *United States v. Carter*, 353 U.S. 210, 220 (1957). The trustees herein advocate the interest of the thousands of employees covered by their employee benefit plans. We believe that it is important for the Court to understand the severe hardship that will befall the trusts and the employees, if Petitioner prevails.

These *amici*, like the Respondent trust funds and others similarly situated, rely on timely employer contributions to fund the employee benefit programs they offer. Some con-

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[3]The term "Taft-Hartley trust funds" is a shorthand expression used to refer to employee fringe benefits trusts established pursuant to collective bargaining and administered pursuant to the strictures of Section 302(c) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §186(c). ("The Act" or "LMRA").

tributions to the trust funds come from employers who are members of various employer associations. In addition, these *amici* receive contributions from approximately 3,700 employers who are not members of an employer association. This latter group of employers, colloquially called "short formers," have some form of collective bargaining agreement with the unions. These agreements may be pre-hire agreements that have ripened into full majority status agreements. They may also be majority status agreements from the start. These agreements could also be pre-hire agreements that have not ripened into full majority status agreements. On their face, the employer recognizes the union as the exclusive bargaining representative of the employees in that craft. As employers go in and out of the construction business, like agreements are signed and copies routinely furnished to the trustees. At no point are the trustees in a position to know or ascertain the actual relationship between the union and the "short-form" employer. What was a pre-hire agreement yesterday, may have ripened into a full majority status agreement next week or next month.

The trustees can and do rely on the full enforceability of these agreements. The trust funds use these facially valid employer commitments to structure the benefit programs in a prudent manner. Employer contributions are used by the trusts to pay both current benefits and to provide for the future welfare of retirees. The pensions of these retired beneficiaries are directly tied to employer contributions, and are wholly dependent upon the ability of the trusts to collect these promised payments. Expert pension advisors base their evaluation of the financial health of a trust and its future, in part, on the number of signatory employers and covered employees. If the void *ab initio* approach is accepted by this Court, these evaluations and forecasts will be useless and the trustees will be on quicksand, never knowing when

contributions will be abruptly halted. As indicated above, the trustees do not know and can not ascertain the precise collective bargaining status of thousands of employers as they move in and out of collective bargaining relationships with the unions.

These *amici* perceive a further hardship resulting from the void *ab initio* approach. Such a holding arguably means that the trust funds would have to prove in every collection case that at the time that they received the employer's contribution the unions represented a majority of the employer's workforce.

The extreme difficulty, if not impossibility, of this task becomes apparent when it is realized that in the construction industry an individual employee typically works for many employers and none of them continuously. Jobs are frequently of short duration and the workforce is extremely mobile. *See Pacific Northwest Chapter, Etc. v. N.L.R.B.*, 654 F.2d 1301 (9th Cir. 1981); *affirmed as modified*, ... U.S. ...., 102 S.Ct. 2071 (1982). It is entirely conceivable that many years after the employee has completed his work, when the issue of majority status is raised, the employee may be out of reach, mentally incapacitated, or even deceased.

The problem would be especially acute among the employees who worked for small employers, the ones most inclined to enter into Section 8(f) agreements. Many of these small employers employ only two or three individuals at any given time. The absence or incapacity of just one or two of the employees might mean that the trust funds could never prove that the union represented a majroity of the

employer's workforce at the time that delinquencies were incurred.[4]

Fringe benefit trust funds such as health and welfare, vacation, training and apprenticeship trusts all expend funds currently for the benefit of beneficiaries. A void *ab initio* holding would put these trust funds in the difficult position of trying to recoup these already-expended funds from the beneficiaries. It is highly unlikely, however, that any effort to recoup funds from such diverse groups of individuals would be successful. Surely, Congress could not have intended for these hardships to fall on trust funds and employees.

Comprehensive pension legislation adopted by Congress in the form of ERISA in 1974[5] and the MPPAA in 1980,[6] demonstrates its concern for the continued soundness of employee benefit plans. This concern has also become an important part of our national labor policy. The view that pre-hire agreements are void would materially compromise the thrust of these enactments. Congress specifically found that the financial soundness and stability of multiemployer pension plans were express purposes behind the enactment of the MPPAA because "the continued well-being and security of millions of employees, retirees, and their dependents are directly affected by multiemployer pension

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[4]Some employers have also argued that the trust funds must prove majority status as a condition to discovery of an employer's payroll records. Moreover, it is no answer to say that the trustees could just examine the records to determine whether, at the time in question, an employee was a member of the union or not. This is because "it is well established that union membership is not always an accurate barometer of union support." *Authorized Air Conditioning Co. v. N.L.R.B.*, 606 F.2d 899, 906 (9th Cir. 1979), *cert denied*, 445 U.S. 950 (1980).

[5]Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829, *et seq.* (September 2, 1974).

[6]Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208, *et seq.* (September 26, 1980).

plans."[7] To this end, Section 306(a) of the MPPAA was enacted which added Section 515 to ERISA (29 U.S.C. §1145) and which allows for the collection of delinquent contributions by trustees of multiemployer plans.

Section 515 provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such agreement.

Senator Williams, one of the co-sponsors of the section, reiterated the national labor policy behind Section 306(a):

> "It is essential to the financial health of multiemployer plans that they and their actuaries be able to rely on any employer's contribution promises. [P]lan participants for whom the employer promises to make pension contributions to the plan in exchange for their labor are entitled to rely on their employer's promises."[8]

In contending that Section 8(f) agreements are void *ab initio* and hence no contract was formed, Petitioner ignores well settled principles of contract law. In the instant case, all of the elements of a bargained-for exchange were present. As the Court of Appeals found, Section 8(f) agreements allow benefits to flow to both union and employer—not the least of which is labor peace in exchange for payment of union wages and fringe benefits.

It is a settled principle of federal labor law that Taft-Hartley trust funds are intended third party beneficiaries of collective bargaining agreements. *Lewis v. Benedict Coal*

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[7]29 U.S.C. §1001a(a)(3). The trust funds are "multiemployer plans" within the meaning of the MPPAA. 29 U.S.C. §1002(37).

[8]126 CONG. REC. §10102 (daily ed. July 29, 1980).

Corp., 361 U.S. 459 (1960); *Kaiser Steel Corp. v. Mullins*, ... U.S. ..., 102 S.Ct. 851 (1982). As such, they are innocent third parties who rely on the employer's promise to the union that it will contribute to the trust funds on behalf of its employees. It is apparent that the relief Petitioner seeks is tantamount to recision of its agreement. However, it is fundamental law that the rights of intended beneficiaries, such as the trust funds, vest when such beneficiaries change their position in justifiable reliance on the validity of contracts; and, that parties to a contract may not recind when such rights have vested. *See RESTATEMENT (SECOND) OF CONTRACTS* §311 (1979); *Manning v. Wiscombe*, 498 F.2d 1311 (10th Cir. 1974).

It is submitted, therefore, that under comprehensive employee benefit legislation and the Court's prior holdings on the nature of trust funds that the void *ab initio* approach is incompatible with national labor policy.

II.

The Void *Ab Initio* Approach Is Incorrect as a Matter of Law.

Petitioner contends that construction pre-hire agreements are void *ab initio* unless the union affirmatively demonstrates majority status. This contention rests primarily on the Fifth Circuit case of *Baton Rouge Building and Construction Trades Council v. E.C. Schafer Construction Co.*, 657 F.2d 806 (1981).[9] The Fifth Circuit's opinion is notable primarily for its failure to discuss the critical issue presently before the Court. In *Schafer*, the Fifth Circuit (at p. 809) recites the familiar rules dealing with Section 8(f) as an exception to the general prohibition against pre-hire agree-

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[9]It also rests, to a lesser extent, upon the Eleventh Circuit case of *Laborers District Council, Etc., et al. v. McDowell Contractors, Inc.*, ... F.2d .... 110 LRRM 2965 (1982).

ments and the need for such agreements to ripen into full majority status collective bargaining agreements. From these established principles, the Fifth Circuit leaps into the untenable conclusion that pre-hire agreements are void *ab initio*. As we show below, the Fifth Circuit has misread the law as it has been developed by the Court and the National Labor Relations Board.

In deciding that the pre-hire agreement was void *ab initio*, the Fifth Circuit relied primarily on certain language from the Court's opinion in *NLRB v. Local Union No. 103, International Association, Etc. (Higdon)*, 434 U.S. 335, 351-52 (1978). In so doing, the Fifth Circuit failed to observe the context of these statements and that the language relied upon is plainly dictum.

In the *Higdon* majority opinion, the entire discussion of enforceability by lawsuit occurred subsequent to the Court's critical finding that pre-hire agreements are "voidable" up until the time that the union achieves majority status. The Court, having sustained the Board on that critical issue, could well have terminated its opinion at that point. However, the Unions had advanced an argument based on the Court's prior holding in *Retail Clerks International Association v. Lion Dry Goods, Inc.*, 369 U.S. 17 (1962). The Court's opinion, therefore, went on to distinguish that case on the basis that it dealt with the jurisdiction of the federal courts. It is clear, however, that the Court's discussion of *Lion Dry Goods*, *id.* and the enforceability by lawsuit of pre-hire agreements was offered in a rebuttal to the contentions advanced by the Unions.[10] They had argued that the

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[10]In *Higdon*, neither the Board nor Local Union No. 103 thought enough about the relevancy of *Lion Dry Goods* to even cite that case in their briefs to the Court. It appears that *Lion Dry Goods* was first mentioned by the *Amicus Curiae* brief of the AFL-CIO. Brief for the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae*, pp. 12-13, reprinted by Law Reprints, Inc., Labor Series, vol. 11, No. 4, 1977/1978 Term.

Board's voidability rule conflicted with the law as it had developed under Section 301(a) of the Act—observing correctly that *Lion Dry Goods* had held that a minority union could enforce its agreements with the employer in a Section 301 suit. From that conclusion, the Unions urged that Section 8(f) agreements could not be voidable in the N.L.R.B. forum and fully enforceable in the federal courts. In the view of the Unions, this alleged inconsistency compelled remand to the Board for reconsideration of its position that such agreements are voidable. In response to the Unions' contention, the Board argued that the Unions' premise, while probably correct, did not necessarily compel the conclusion that a minority union may not subsequently be ousted by vote of the employees pursuant to an N.L.R.B. conducted election. Thus, the discussion of *Lion Dry Goods* by the *Higdon* Court was intended to explain that there was no logical inconsistency between the voidability proposition advanced by the N.L.R.B. and the holding in *Lion Dry Goods* that such agreements are enforceable in a Section 301(a) suit.

In *Schafer*, *supra*, the Fifth Circuit failed to discern that *Higdon* had not overruled *Lion Dry Goods* and that the Court's remarks merely explained why there was no logical inconsistency between the two cases. It is this faulty reading of *Higdon* that misled the court to the erroneous conclusion that labor organizations must prove majority status as a condition to the recovery of damages for breach of contract. In so doing, the Fifth Circuit effectively transformed "voidable" contracts into "void" contracts and failed to see that *Higdon* and *Lion Dry Goods* were intended to co-exist as a joint statement of the law. By contrast, the Ninth Circuit's opinion in the instant case harmonizes these two cases, preserving the Board's voidability rule and at the same time

continuing the court enforceability of collective bargaining agreements.

Lion Dry Goods, when read together with the Court's opinion in *Higdon*, irrefutably establishes the rule that causes of action arising prior to lawful ouster of the union remain enforceable in the courts. Plainly, the void *ab initio* approach is inconsistent with the rule established by the cases of *Lion Dry Goods* and *Higdon*. We urge the Court to specifically disavow this approach in its opinion in the instant case.

III.

Payments to Employee Benefit Plans by a Contractor Pursuant to a Pre-Hire Agreement Do Not Contravene the Policies of the Act.

This past term, the Court, in *Kaiser Steel Corp. v. Mullins*, ... U.S. ...., 102 S.Ct. 851 (1982) the Court held that unlawful agreements are not enforceable in an action under section 301 of the Act. Conversely, labor agreements are fully enforceable if they do not contravene such Act policies as: (1) the Section 7 rights of employees; (2) the prohibition against hot cargo agreements; (3) the exclusive jurisdiction of the Board to establish collective bargaining units pursuant to Section 9(a) of the Act; or (4) the prohibition against unfair labor practices pursuant to Section 8 of the Act. As we show below, the enforcement of the instant agreement does not contravene any policies of the Act and the countervailing policies of Section 301 compel the conclusion that the instant agreement is fully enforceable.

The instant Section 301(a) case involves policy considerations germane to: (1) traditional notions of the sanctity of contract; (2) the rights of innocent third party creditor beneficiaries; (3) the stability of collective bargaining in an entire industry; and (4) the actuarial soundness of employee

pension and health and welfare benefit plans. The void *ab initio* approach adopted by the Fifth Circuit in *Schafer, supra*, completely ignores the existence of these valid policies. By contrast, other circuit courts, including the Ninth Circuit in its opinion below have amply observed the foregoing policies and given them proper weight.[11] *Contractors, Laborers, Teamsters, and Engineers Health & Welfare Plan v. Associated Wrecking Co.*, 638 F.2d 1128 (8th Cir. 1981); *New Mexico District Council of Carpenters v. The Mayhew Co.*, 664 F.2d 215 (10th Cir. 1981); *Washington Area Carpenters' Welfare Fund et al. v. Overhead Door Co.*, 681 F.2d 1 (D.C.Cir. 1982).

The policies expressed in Sections 7, 8 and 9 of the Act in no way bear upon, let alone militate against, requiring a contractor to live up to its fringe benefit payment obligations to an innocent third party creditor beneficiary. Certainly, the employer commits no unfair labor practice under Section 8 of the Act by making such payments. The Section 7 rights of employees to join labor organizations or refuse to join them are also protected. The benefits offered by trust funds are available to all employees regardless of their union membership. In some cases, the employees will be keenly aware of and will rely upon the employer's obligation to make fringe benefit contributions on their behalf. In other cases, the employees will be oblivious of the employer's promise to make such fringe benefit contributions. In either case, the enforcement of the employer's obligation to contribute does no violence to the free choice of employees to join or not join labor organizations. The N.L.R.B. has never denied the lawfulness of Section 8(f) agreements nor has

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[11]The contractor signing a pre-hire agreement "buys" labor peace and a source of skilled labor to do his work. The contractor's secret intent to ignore the fringe benefit contribution obligations contained therein cannot be binding on these innocent third party beneficiaries.

it ever held that they in any way violate the Section 7 rights of employees. Indeed, since *Higdon*, the Board has continued to fashion national labor policy along the lines suggested herein. *International Union of Operating Engineers, Local 150*, 255 NLRB No. 83 (1981); *Albuquerque Insulation Contractor, Inc.*, 256 NLRB No. 15 (1981). Finally, upholding the court enforceability of pre-hire agreements does not encroach upon the exclusive jurisdiction of the Board to determine appropriate collective bargaining units and/or to certify or decertify labor organizations as the majority representative of the employees. Indeed, requiring a trust fund to prove majority status as a condition to suit injects the district courts into areas of the labor/management relationship which Congress has vested in the exclusive jurisdiction of the National Labor Relations Board. *Leedom v. Kyne*, 358 U.S. 184 (1958); *South Prairie Construction Co. v. Local 627, International Union of Operating Engineers*, 425 U.S. 800 (1976); *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959); *Local No. 3-193, International Woodworkers of America v. Ketchikan Pulp Company*, 611 F.2d 1295 (9th Cir. 1980).

Under the rule advocated by Petitioner, the courts will now have to answer such questions as: What is the appropriate unit? Are certain employees excluded from the unit because they are supervisors? Is a single craft unit an appropriate unit for bargaining? Do the employees have a "community of interest"? Has the employer's conduct dissipated the union's majority status? These are all celarly Board questions within its special competence. Other issues before the district court will be: Does Board law apply or are the courts to fashion their own common law independent of the Board? If Board law applies, how will the courts reconcile Board cases that are in seeming conflict? *Cf. Dee Cee Floor Covering, Inc.*, 232 NLRB 421 and *Haberman*

Construction Company, 236 NLRB 79, *enforcement denied en banc*, 641 F.2d 351 (5th Cir. 1981). The Fifth Circuit in *Schafer*, *supra*, obviously failed to consider these important issues and the heavy burden its approach imposes on the district courts.

In sum, the policies of the Act as expressed in Sections 7, 8 and 9 will be bolstered by a rule upholding court enforceability without regard to belated claims of lack of majority status.

Conclusion.

The judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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